Karumalay a/l Vanniyan & Anor v Ananthan a/l Rethinam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–04–87 OF 2001
ABDUL MALEK AHMAD PCA, RICHARD MALANJUM AND AUGUSTINE PAUL JJCA
10 MARCH 2005

Civil Procedure — Appeal — Interference by appellate court — Lower court over-emphasised inconsistencies of appellants' evidence — Not objective and one sided approach to evidence by lower court — Whether interference by appellate court warranted

Evidence — Witness — Discrepancy in evidence — Whether evidence must be discarded entirely

At about 2.30am on 25 December 1993 two motorcycles, one of which involving the first and second appellants, collided. It was the assertion of the appellants that the other motorcycle was driven by the respondent and it encroached into their rightful lane without any warning thereby causing the collision. In response, the respondent denied being involved in any collision on that fateful morning. Having heard the evidence, the learned sessions court judge found the appellants' accounts of the incident to be conflicting and thus not credible. The learned sessions court judge also disbelieved the prime witness of the appellants (PW2), who testified that he witnessed the collision. On appeal, the High Court concurred with the findings of the learned sessions court judge in particular on the credibility of the appellants and PW2. The appellants appealed.

Held, allowing the appeal:

(1) An appellate court is generally inclined to interfere with a decision of a sessions court if it has been arrived at without any or insufficient judicial evaluation and appreciation of the evidence adduced (see para 17). In this appeal, the learned sessions court judge over-emphasised the inconsistencies in the testimonies of the appellants and that of PW2 without considering their overall evidence as against the whole of the evidence adduced including that of the respondent (see para 18). Accordingly, interference by this court was warranted since there was 'non-consideration of material evidence and appreciation of evidence' and the approach to the evidence was 'not objective and one sided' (see para 21).

(2) It was wrong and devoid of any cogent reason for the learned sessions court judge to discard entirely the evidence of PW2 solely on the basis that his evidence was in conflict with the evidence of the appellants on certain issues which were not directly related to his statement that he saw the registration number of the other motorcycle involved in the collision. The learned sessions court judge failed to consider the fact that PW2 was an independent witness (see para 24). Overall, there was no lawful and justifiable reason for disbelieving the testimony of PW2 particularly

his assertion that he saw and could still remember the registration number of the other motorcycle involved in the collision. His evidence provided the nexus between the motorcycle of the respondent and the collision (see para 35).

(3) Judicial evaluation of the evidence of the respondent was obviously absent (see para 40). No doubt the apparent one-sided approach by the learned sessions court judge might have been premised on the basis that the burden was on the appellants to prove their case. But surely in the instant case, at least an attempt to, equalise the standard of appreciation of the evidence adduced by both sides should have been made (see para 42).

[**Bahasa Malaysia summary**

Lebih kurang pukul 2.30pg pada 25 Disember 1993, dua buah motosikal, salah satu melibatkan perayu-perayu pertama dan kedua, telah berlanggar. Adalah hujah perayu-perayu bahawa motosikal yang satu lagi ditunggang oleh responden dan telah memasuki bahagian jalan perayu tanpa apa-apa amaran sehingga menyebabkan perlanggaran tersebut. Sebagai jawapan, responden menafikan beliau terlibat dalam apa-apa perlanggaran pada pagi itu. Setelah mendengar keterangan, hakim mahkamah sesyen yang bijaksana mendapati maklumat perayu-perayu tentang kejadian tersebut bercanggah dan oleh itu tidak boleh dipercayai. Hakim mahkamah sesyen yang bijaksana juga tidak mempercayai saksi utama perayu-perayu (PW2), yang memberikan keterangan bahawa beliau telah menyaksikan perlanggaran itu. Semasa rayuan, Mahkamah Tinggi bersetuju dengan penemuan hakim mahkamah sesyen yang bijaksana khususnya kebolehpercayaan perayu-perayu dan PW2. Perayu-perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Mahkamah Rayuan secara amnya akan campur tangan dengan keputusan mahkamah sesyen yang diperoleh tanpa apa-apa atau penilaian kehakiman dan penghayatan keterangan yang dikemukakan itu tidak mencukupi (lihat perenggan 17). Dalam rayuan ini, hakim mahkamah sesyen yang bijaksana terlalu memberi penekanan tentang percanggahan dalam keterangan-keterangan perayu-perayu dan PW2 tanpa mengambil kira keterangan keseluruhan mereka termasuklah yang diberikan oleh responden (lihat perenggan 18). Sewajarnya, campur tangan oleh mahkamah ini diwarankan memandangkan terdapat 'non-consideration of material evidence and appreciation of evidence' dan pendekatan kepada keterangan adalah 'not objective and one sided' (lihat perenggan 21).

(2) Adalah salah dan tiada alasan yang kukuh untuk hakim mahkamah sesyen yang bijaksana menolak keseluruhan keterangan PW2 semata-mata berdasarkan bahawa keterangannya bercanggah dengan keterangan perayu-perayu berhubung isu-isu tertentu yang tidak secara langsung berkaitan

dengan kenyataan beliau bahawa beliau melihat nombor pendaftaran motosikal satu lagi dalam perlanggaran itu. Hakim mahkamah sesyen yang bijaksana gagal untuk mengambil kira fakta bahawa PW2 adalah saksi yang bebas (lihat perenggan 24). Secara keseluruhan, tiada alasan yang sah dari segi undang-undang dan boleh dijustifikasikan untuk tidak mempercayai keterangan PW2 khususnya hujah beliau yang beliau melihat dan masih boleh ingat nombor pendaftaran motosikal satu lagi yang terlibat dalam perlanggaran itu. Keterangan beliau memberikan nexus antara motosikal responden dan perlanggaran itu (lihat perenggan 35).

(3) Penilaian kehakiman ke atas keterangan responden tidak wujud (lihat perenggan 40). Meskipun tidak dinafikan pendekatan menitikberatkan satu pihak sahaja oleh hakim mahkamah sesyen yang bijaksana mungkin berdasarkan bahawa beban terletak atas perayu-perayu untuk membuktikan kes mereka. Namun sememangnya dalam kes semasa, sekurang-kurangnya percubaan untuk mengimbangkan piawai menghargai keterangan yang dikemukakan oleh kedua-dua pihak sepatutnya dibuat (lihat perenggan 42).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 946–964.

For a case on effect of discrepancy in evidence of a witness, see 7*Mallal's Digest* (4th Ed, 1995 Reissue) para 1691.

Cases referred to

Abraham Ho Ah Loke v William Manson-Hing [1949] MLJ 37 (refd)
Benmax v Austin Motor Co Ltd [1955] AC 370 (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (refd)
Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165 (refd)
Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465 (refd)
Ee Choon Bok & Anor v Public Prosecutor [1951] MLJ 183 (refd)
Kalachand v Queen-Empress ILR 13 Cal 53 (refd)
Khoon Chye Hin v Public Prosecutor [1961] MLJ 105 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 MLJ 57 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)
Public Prosecutor v Ramli bin Shafie [2002] 6 MLJ 153 (refd)
Putra v Sivagnanam & Anor [1959] MLJ 259 (refd)
Shanmugam v Public Prosecutor [1963] MLJ 125 (refd)
Sheo Swarup & Ors v The King Emperor 51 TLR 10 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Tek Chand v Pile Ram AIR 2001 SC 905 (refd)

Appeal from: Civil Appeal No 96/96(S)–12–185 of 1996 (High Court, Pulau Pinang) and Civil Suit No 53–286 of 1994 (Sessions Court, Pulau Pinang)

Brijnandan Singh Bhar (Brijnandan Singh Bhar & Co) for the appellants.
CV Prabhakaran (Rajiv Prabhakaran with him) (Praba & Associates) for the respondent.

Richard Malanjum JCA (delivering judgment of the court):

INTRODUCTION

[1] On 16 August 2004 we allowed this appeal. We reversed the judgment of the sessions court which was upheld by the High Court on appeal. We came to the conclusion that the respondent was liable for the collision of the two motorcycles bearing registration numbers DP 3935 and PBH 2519 respectively on 25 December 1993 along Jalan Tanjung Bunga in front of Hotel Mount Pleasure, Penang. The issue of quantum was not before us and not an issue between the parties.

[2] Since we reversed the concurrent decisions of the courts below, it would only be appropriate that we should give our reasons. In doing so we are well aware of the principle that generally a higher appellate court does not interfere with concurrent findings of fact by an intermediate appellate court and a trial court unless there is clear justification (see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465). Where the findings of fact depended upon inferences drawn from other facts an appellate court is more readily inclined to interfere with such findings and form its independent opinion as the court is in as good a position to review and evaluate the evidence of the case as the trial judge (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517). We also bear in mind that it is the duty of an appellate tribunal to check by critical examination of the whole of the evidence a trial judge's conclusion as to the truthfulness of a particular witness (see *Abraham Ho Ah Loke v William Manson-Hing* [1949] MLJ 37).

BACKGROUND FACTS

[3] At about 2.30am on 25 December 1993 two motorcycles collided along Jalan Tanjung Bunga in front of Hotel Mount Pleasure, Penang. The rider of the motorcycle bearing registration number DP 3935 was the first appellant with the second appellant as the pillion rider. They were coming from Bayan Baru and heading for Batu Ferringgi to meet up with some friends at Borsalino Disco.

[4] As a result of the collision, both the appellants were injured requiring hospitalisation.

[5] There was no police report made soon after the collision. It was only made on 15 February 1994 by the first appellant disclosing, *inter alia*, PBH 2519 as the registration number of the other motorcycle involved. It was not denied that such motorcycle was registered under the name of the respondent.

[6] It was the assertion of the appellants that the other motorcycle encroached into their rightful lane without any warning thereby causing the collision.

[7] In response, the respondent denied being involved in any collision on that fateful morning. He asserted that he was at home sleeping. But having pleaded thus, the respondent went on to say that even if he was involved, the collision was due to the negligence of, or contributed by, the appellants.

IN THE SESSIONS COURT

[8] Having heard the evidence, the learned sessions court judge came to the conclusion that the appellants had failed to prove their case. Their accounts of the incident were found to be conflicting and thus not credible. The learned sessions court judge also disbelieved the prime witness of the appellants, namely, George Albert a/l Jacob (PW2), who testified that he witnessed the collision and did help the injured appellants. The learned sessions court judge went on to rule that it was for the appellants to establish their case on the balance of probabilities and not for the respondent to prove that he was not involved in the collision.

[9] The respondent only gave evidence along the line of his main defence, namely, denial of involvement in any collision on or around the morning of 25 December 1993.

IN THE HIGH COURT

[10] In dismissing the appeal, the learned High Court judge concurred with the findings of the learned sessions court judge in particular on the credibility of the appellants and PW2. The findings of the sessions court were viewed as well-reasoned.

[11] It was also the conclusion of the learned High Court judge that the learned sessions court judge had considered the evidence adduced as a whole including a finding of fact that the respondent was sleeping in his house at the time of the alleged collision.

[12] On the alternate plea of the respondent, the learned High Court judge took the view that it was proper and in accordance with the accepted rules of pleadings.

THE APPEAL

(a) The contentions

[13] Before us, learned counsel for the appellants raised several grounds in seeking for the reversal of the decisions of the courts below.

[14] And in his submissions, learned counsel highlighted the following points:

(a) the failure of the learned sessions court judge to do a proper evaluation of the evidence adduced. Those favourable to the appellants and those adverse to the respondent were not considered or not sufficiently evaluated;

(b) the respondent only appeared before the sessions court at the defence stage, hence he could not be brought in earlier by the first appellant for the purpose of identification;

(c) the appellants paid full attention to the plate number of the other motorcycle while the respondent was fleeing from the scene of the collision;

(d) the main defence of the respondent was a complete denial and alibi. However, an alternative defence of negligence or contributory negligence was also pleaded. The sessions court did not consider the issue and should have put the respondent to election;

(e) there were inconsistencies in the evidence of the respondent but the sessions court failed to consider them;

(f) the respondent failed to call his landlord although he was given time to do so. The sessions court did not draw any adverse inference for such failure;

(g) the issue on how PW2 was located by the appellants was not raised by the respondent and yet the sessions court took upon itself to consider it and made conclusions thereto;

(h) the learned High Court judge merely adopted and supported the findings of the sessions court without examining the bases of such findings; and

(i) the learned High Court judge made erroneous inferences.

[15] In response, learned counsel for the respondent submitted thus:

(a) that the sessions court did evaluate all the evidence adduced;

(b) PW2 was a member of the auxiliary police and yet he failed to lodge a police report on the incident;

(c) that a police report was only lodged two months after the incident and not at the earliest opportunity available;

(d) the sessions court accepted the alibi defence of the respondent;

(e) since no photograph was produced of the damaged motorcycle of the first appellant, his assertion of such collision should be viewed with suspicion;

(f) there was no corroborative evidence adduced;

(g) the landlord of the respondent could not be called as a witness due to time constraints; and

(h) the alternative plea was merely a general question in relation to the issue of damages.

(b) The oral judgment

[16] In our short oral judgment, we said that there were unsatisfactory features in the judgment of the sessions court, in particular, on the evaluation and appreciation of the evidence adduced and the wrong inferences made thereto. We, therefore, found it necessary to interfere with the decisions of the courts below and thus allowed this appeal.

(c) The law

[17] There are a host of reported cases, both local and foreign, which expound the legal principle that an appellate court is generally inclined to interfere with a decision of a sessions court if it has been arrived at without any or insufficient judicial evaluation and appreciation of the evidence adduced. In *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 Gopal Sri Ram JCA succinctly stated the principle at pp 116–120:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
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> …
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> In our considered judgment, the authorities discussed thus far, apart from explaining what judicial appreciation of evidence involves, illustrate a principle central to appellate interference. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal There are several authorities that establish the principle.

(See also *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57; *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465; *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; *Putra v Sivagnanam & Anor* [1959] MLJ 259; *Benmax v Austin Motor Co Ltd* [1955] AC 370; *Sheo Swarup & Ors v The King Emperor* 51 TLR 10 (PC).)

(d) Reviewing the Grounds of Judgment of the sessions court

[18] In the instant appeal, we note that in the grounds of judgment of the learned sessions court judge the inconsistencies in the testimonies of the appellants and that of PW2 were over-emphasised without considering their overall evidence as against the whole of the evidence adduced including that of the respondent.

[19] It was not considered that there was hardly any challenge to the evidence of the appellants and that of PW2 on specific and relevant material facts to the claim, namely, that the collision did happen and that the appellants were injured. And in view of the defence adopted by the respondent during the trial, the only main issue left for determination was the identification of the other motorcycle involved in the collision. Such issue should have been resolved by simply identifying the relevant evidence adduced by the appellants and the respondent and then '*assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part*' of such evidence.

[20] Unfortunately, the learned sessions court judge failed to do so. As indicated above only the inconsistencies in the testimonies of the appellants and that of PW2 were appraised and subsequently used as the basis to disbelieve them and thereafter concluding that no case had been proved by the appellants on the balance of probabilities. There was scarcely any evaluation of the evidence of the respondent. In other words there was nothing in the grounds of judgment to indicate that the learned sessions court judge actually believed the respondent and disbelieved the appellants and PW2.

[21] Accordingly, interference by this court was warranted since there was 'non-consideration of material evidence and appreciation of evidence' and the approach to the evidence was 'not objective and one sided'. (See *Tek Chand v Pile Ram* AIR 2001 SC 905 cited in *Lee Ing Chin @ Lee Teck Seng & Ors v Can Yook Chin & Anor*).

[22] In fact, the learned sessions court judge went by way of inference and deduction in disbelieving the evidence of the appellants and that of PW2. The discrepancies noted were:

(a) the inconsistent statements by the first appellant in describing his position just before the collision. Initially, he said that he saw two motorcycles coming in the opposite direction with the first machine entering his lane and colliding with his motorcycle. Subsequently, he said that because there was a sharp corner to negotiate, he first saw the other motorcycle when it collided with his motorcycle;

(b) the conflicting statements by the first appellant, the second appellant and PW2 on the positions of the appellants while on the ground after the collision. The appellants said that they were facing Georgetown while PW2 said that he saw them lying down facing Batu Ferringhi. But in re-examination, PW2 qualified his earlier statement by saying that he did not know their positions before he came to their aid;

(c) the conflicting statements by the first appellant, the second appellant and PW2 on where PW2 stopped his motorcycle before coming to assist the appellants. The first appellant said that PW2 stopped it near where he was lying down but the second appellant stated that PW2 stopped his motorcycle on the road but not near them. PW2 said that he stopped his machine on the other side of the road before coming to help the appellants;

(d) the conflict in the statements by the second appellants and the first appellant on what PW2 did after getting them onto a lorry to send them to the hospital. The second appellant said that PW2 followed the lorry while the first appellant said that he did not know where PW2 went after halting the lorry. In his evidence, PW2 said that he went back after helping the appellants;

(e) the discrepancy about the visit of PW2 to the hospital to see the first appellant. The first appellant said that PW2 came to see him while PW2 denied this and said that he did not even know the location of the hospital; and

(f) the conflict between the statements of the second appellant and that of PW2 regarding the giving of the registration number of the other motorcycle. The second appellant claimed that he gave the number to PW2 but the latter never mentioned it in his statement.

[23] It is obvious that the noted discrepancies do not relate directly to the identification of the other motorcycle involved in the collision. Yet they were used by the learned sessions court judge by way of inference and deduction to disbelieve the overall evidence of the appellants and that of PW2 while completely ignoring their other unchallenged but material evidence. In our view, the approach was flawed in law.

[24] In her grounds of judgment the learned sessions court judge also expressed reservation on the ability of PW2 to recall the registration number of the other motorcycle involved in the collision just because he denied visiting the first appellant in the hospital. We think the doubt was unjustified since his denial was not proved to be false. Further, it was wrong and devoid of any cogent reason for the learned sessions court judge to discard entirely the evidence of PW2 solely on the basis that his evidence was in conflict with

the evidence of the appellants on certain issues which were not directly related to his statement that he saw the registration number of the other motorcycle involved in the collision. The learned sessions court judge failed to consider the fact that PW2 was unknown to the appellants before the collision and that his evidence was not motivated by any reason. In other words, PW2 was an independent witness.

(e) Evidence identifying the other motorcycle involved in the collision

[25] The evidence on the identification of the registration number of the other motorcycle involved in the collision may be rehearsed briefly. It was the evidence of both the appellants that after they fell down from their motorcycle due to the collision, they were facing in the direction of Georgetown. Hence they managed to see the registration number of the other motorcycle involved. But the first appellant also said that he attempted to get up but failed. Nevertheless, he managed to see the registration number. As for the second appellant, he stated that he managed to sit down and that was when he managed to look at the plate number of the other motorcycle.

[26] In his evidence, PW2 initially said that when he came to help the appellants, both were lying down facing Batu Ferringhi. But in his re-examination, PW2 admitted not knowing the positions of the appellants before he came. It was on the basis of the evidence of PW2 that the learned sessions court judge made an inference, namely, that the appellants could not have seen the registration number of the motorcycle since they must have been in lying down positions as found by PW2 who came to their aid soon after the collision.

[27] We would say that the inference was too presumptuous. It also set too high a standard for the appellants to meet when there was no necessity to do so. For instance, while accepting that PW2 came so soon after the collision, the learned sessions court judge omitted to note the clarification by him in re-examination. In other words, the learned sessions court judge refused to believe the appellants' version even with the benefit of the clarification by PW2.

[28] The learned sessions court judge should have taken into account that after the fall, it was the unchallenged evidence of both the appellants that they attempted to get up. As such, there must have been some movements made. It would therefore be erroneous to assume or infer that the appellants must have been motionless after the fall. There was no doubt that they were conscious even after the fall.

[29] Now, even assuming that the evidence of the appellants on the registration number of the other motorcycle involved in the collision were suspect, there was still the evidence of PW2 which should have been critically considered by the learned sessions court judge.

[30] According to PW2, while he was helping the appellants, the rider of the other motorcycle pushed up his machine and left the scene. But that did not prevent PW2 from having a look at the registration number and he was sure of it as the place was lighted. This part of his evidence was unshaken even while under cross-examination.

[31] Unfortunately, the learned sessions court judge disbelieved him on the basis as discussed hereinabove. Critical factors such as the absence of motive on the part of PW2 in coming to the court to testify and that the appellants and PW2 were strangers before the collision were not taken into account before disbelieving PW2. There was, therefore, no proper appreciation of such evidence. If the learned sessions court judge had undertaken such exercise, a different conclusion would have been arrived at towards PW2.

[32] We also note that on one hand the learned sessions court judge disbelieved PW2 while on the other his evidence was relied upon to disbelieve the appellants regarding their positions after the collision. It is settled law that once part of a witness's evidence is disbelieved the rest should be considered with caution. (See *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105). And if any part of it is relied upon, cogent reason for doing so should be given. (See *Ee Choon Bok & Anor v Public Prosecutor* [1951] MLJ 183) In the instant case, the learned sessions court judge failed to adhere to such principles of law.

[33] Other reasons advanced by the learned sessions court judge in disbelieving PW2 were:

(a) his failure to lodge a police report or to inform and assist the police in its investigation on the collision;

(b) his failure to write down the number on any piece of paper and to keep it in his possession;

(c) the lapse of four months after the collision when he was contacted by the second appellant; and

(d) the absence of any explanation as to how he was traced and contacted by the first appellant.

[34] The first three reasons are related to the recollections of PW2. Further, in respect of the first reason, it is a principle of law that a witness should not be disbelieved just because he did not on his own accord go to the police and make a statement (see *Shanmugam v Public Prosecutor* [1963] MLJ 125). As for the last reason, it is irrelevant. It was rightly left out by the respondent. Unfortunately, the learned sessions court judge deemed it necessary to consider.

[35] Overall, therefore, there was no lawful and justifiable reason for disbelieving the testimony of PW2 particularly his assertion that he saw and could still remember the registration number of the other motorcycle involved in the collision. His evidence provided the nexus between the motorcycle of the respondent and the collision. Thus, if that course was taken by the learned

sessions court judge, she would have found that on the balance of probabilities, at least a *prima facie* case had been established by the appellants at the close of their case. The respondent would then have to rebut it.

(f) The evidence of the respondent

[36] In his evidence, the respondent denied that he was involved in any collision on 24 December 1993 or 25 December 1993. He said that at about 2.30am on 25 December 1993, he was at home sleeping after watching television. He also denied lending his motorcycle to anyone during that time. And although he had two sets of keys for his motorcycle, the respondent said that he kept both sets in his room and no one could have taken any of them. He also denied that his motorcycle was damaged during that time.

[37] During his examination in chief, the respondent gave his address at Block 2, Room 37A Off Riverside, Penang. He testified that he was renting a room there. But under cross-examination, he changed it to 25, Kampong Rawa located near Jalan Petani and not Tanjong Bunga or Mount Pleasure. The respondent said that he was renting a room from his landlord, Mr Bala. The respondent also said that the house was fenced. He claimed to be the person who locked the gate of the house on the night of 24 December 1993.

[38] Although there was an alternative plea that the collision was wholly, caused or contributed to by the negligence of the appellants, no evidence was led on this aspect of the defence. Hence, the allegation stood unsubstantiated.

[39] In dealing with the evidence of the respondent, the learned sessions court judge noted the change in the address given by him in the course of his testimony but did not make an issue out of it. Instead, it was only highlighted that the respondent had maintained his stand that he was sleeping in his house at that time and that he did not lend his motorcycle to anyone. The two sets of keys were kept by him and the machine was parked within the compound of the house and the gate locked.

[40] Having said the foregoing, nothing more was said by the learned sessions court judge on the testimony of the respondent. Judicial evaluation of the evidence of the respondent was obviously absent. In *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165 the Privy Council opined that *'if a trial judge feels compelled to reach a conclusion partly favourable to one party and partly to another in a case in which it must at least be plain that one party or the other is not telling the truth, it behoves him to analyse the rival stories with care and to consider their respective probabilities and at least to give reasons for a conclusion*…'. In the instant case, the learned sessions court judge failed to perform such mandatory judicial function.

[41] While the learned sessions court judge faulted the appellants for not calling as a witness the investigating officer of the case, Sgt Adnan, and for failing to give any reason for such failure, no such fault was attributed to the

respondent for not calling his landlord despite earlier indication to the sessions court that he would be called and time was given to do so.

[42] No doubt the apparent one-sided approach by the learned sessions court judge might have been premised on the basis that the burden was on the appellants to prove their case. But surely in the instant case, at least an attempt to, equalise the standard of appreciation of the evidence adduced by both sides should have been made. Otherwise, it would be equivalent to disbelieving the appellants and PW2 on the basis of the testimony of the respondent which was not clearly considered and accepted. In our judgment, such approach runs foul of the requirement that '*a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him*' (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor*).

[43] As regards the judgment of the learned High Court judge, we would only say that it added nothing substantial but merely concurred with that of the learned sessions court judge. There is also one glaring contradictory conclusion in the judgment. In the early part of his judgment, the learned High Court judge took it as a fact that the motorcycle bearing registration number PBH 2519 was involved in the collision. Subsequently, he stated that the learned sessions court judge accepted as a fact that the respondent was sleeping in his house at the time of the collision. No such finding of fact was made by the learned sessions court judge.

[44] The learned High Court judge also made inferences and assumptions which were not supported by the evidence adduced. For instance:

(a) he stated that the second appellant could not have remembered the number of the other motorcycle involved in the collision since he did not write it down and there was already a lapse of two months before the police report was made. In our view, it is too presumptuous to say that within two months PW4 must have forgotten the number;

(b) he highlighted the failure of the appellants to call any independent witness such as the Investigating Officer of Traffic cases. This view appears to indicate that PW2 was in collaboration with the appellants to blame the respondent for the collision when there was no such assertion and no evidence to that effect; and

(c) he concluded that the learned sessions court judge could not accept the evidence of PW2 due to the material discrepancies between the evidence of PW1, PW2 and PW4. In fact such reason did not come from the learned sessions court judge. The term used was 'inconsistencies' and there was no qualification made whether such inconsistencies were major or minor. In law, the two categories have different connotations. Anyway, even '*where*

there are material inconsistencies in the evidence of a witness he can be believed if he is supported by other satisfactory evidence'. (See *Public Prosecutor v Ramli bin Shafie* [2002] 6 MLJ 153 citing *Kalachand v Queen-Empress* ILR 13 Cal 53).

CONCLUSION

[45] If there had been a proper appreciation and evaluation of the evidence and materials, including the evidence of the respondent, placed before the learned sessions court judge, a finding of liability premised on the balance of probabilities would have been made against the respondent.

[46] Thus, for the reasons stated hereinabove we allowed this appeal, reversed the decisions of the Courts below on liability and entered judgment in favour of the appellants as per the quantum decided by the sessions court and affirmed by the High Court.

[47] We did also consider the other issues submitted in the course of the respective submissions by learned counsel for the parties. However we are inclined not to dwell on any of them. Our views on them would have no effect on our final determination of this appeal.

[48] Lastly, we ordered costs of this appeal to be taxed and paid to the appellants. The deposit paid is to be refunded to the appellants.

Appeal allowed.

Reported by Loo Lai Mee